1997

Provo City Corporation v. Joan Patton : Brief of Appellant

Utah Court of Appeals

Lisa Peterson; assistant city attorney.
Joan Patton; appellant pro se.

IN THE UTAH COURT OF APPEALS

PROVO CITY CORP., A Municipal Corporation Plaintiff/Appellee, vs JOAN PATTON, Defendant/Appellant	CASE NO: 970490-CA Priority: 2

OPENING BRIEF OF DEFENDANT-APPELLANT

JOAN PATTON

On Appeal from the Fourth District Court
Utah County, State of Utah, Provo Department
Judge Gary D. Stott

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Case No. 970490-CA

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DATED this 2nd day of February 1998.

JOAN PATTON

Pro Se Defendant/Appellant

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STATEMENT OF JURISDICTION

A. Basis For Subject Matter Jurisdiction in the Court of Appeals

This Appeal is from the conviction of Appellant in the Fourth District Court, Provo Department, Judge Gary D. Stott presiding in a bench trial.

B. Basis For Jurisdiction in the Court of Appeals

Final judgments of conviction appealable to the Court of Appeals pursuant to U.C.A. 78-2a-3(2)(e)(1953 as amended).

C. Appealability of Judgement

A judgment of conviction in a District Court is a final Order pursuant to U.C.A. 78-3-4 (1953 as amended).

D. Notice of Appeal

The Appellant was convicted on May 19, 1997 of violation of Provo City Ordinance 14.34.080(1) Abandonded/Wrecked/Junked Vehicle, and sentenced on June 23, 1997. Appellant filed a Motion for New Trial and a Motion for Arrest of Judgment which were denied on August 4, 1997. A Notice of Appeal was filed in the District Court July 23, 1997 and September 3, 1997. On September 26, 1997 this Court issued a Sua Sponte Motion for Summary Disposition that motion was dismissed.

STATEMENT OF ISSUES ON APPEAL

The issues raised on this appeal are all questions of law, and the Court of Appeals therefore has full power of review, without deference to the findings of the Trial Court. *State v. Pena* 869 P.2d 932 (Utah 1994), at 936 and *State v. Jacques* 924 P.2d 898 (Utah App. 1996), at 900.

1. Was the defendant substantially prejudiced by prosecution's failure to inform her of witness Roger Gonzales.
2. Did the Tri Did the trial court err in overruling defendant's objection to introduction of the surprise testimony of Roger Gonzales, and in denying defendant's motion for new trial and motion for arrest of judgment so prejudice defendant's case as to undermine confidence in its validity and warrant reversal.
3. Did the Defendant have a right to rely on the standards of enforcement set by a Court of Competent Jurisdiction during prior cases.
4. Did the Trial Court err in refusing to allow evidence of a Court established standard.
5. The ordinance should be struck down as vague as it lacks standards necessary to prevent arbitrary enforcement.
6. The ordinance violates the defendants Constitutional rights in its application by failure to provide Equal Protection and Uniform Application.

DETERMINATIVE LAW

1. Rule 16, Utah Rules of Criminal Procedure:

> (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
>
> (1) relevant written or recorded statements of the defendant or co-defendants;
>
> (2) the criminal record of the defendant;
>
> (3) physical evidence seized from the defendant or co-defendant;
>
> (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense

for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense.

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

. . .

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

(g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just under the circumstances.

2. Rule 30(a), Utah Rules of Criminal Procedure:

Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

3. Provo City Ordinance Section 14.34.080(3):

No trash, used materials, junk, household furniture, appliances, scrap material, equipment or parts thereof shall be stored in an open area

4. Utah Constitution Article I Sec. 24:

All laws of a general nature shall have uniform operation.

5. United States Constitution Amendment XIV Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

A Joan Patton and co-defendant, William Patton, were served with summons on May 31, 1996, charging that on March 19, 1996, both defendants had abandoned, wrecked or junked vehicles, or miscellaneous materials in their yard, in violation of Provo City Ordinance 14 34 080 (Trial Index, pages 2-4)

B Extensive informal discovery was conducted by the defendants, beginning at arraignment and continuing throughout preparation for trial The Trial Court asked Provo City if there was any problem with providing complete discovery City Attorney told both Ms Patton and the Trial Court that the city would provide Ms Patton with all information in the file

C At pretrial, the city attorney assured the Court and the Defendant that all matters in the city's file would be provided to the Defendants At that time, the city's zoning officer, Anthony Malloy, indicated to the Defendants and counsel that (1) The complainant in this case was the city as Mr Malloy had been given a "Open" file on the defendants and that he had decided to open a new file for 1996 (2) That he would be the only witness for the city, and that he had taken all relevant photos Ms Patton raised the issue of vagueness of ordinance relating to fence in that the ordinance states that a front fence can be nor more than 3 feet but fails to specify whether the 3 feet is a height, width or depth dimension

D Ms Patton prepared her defense based upon her thorough inspection of the representation by the city attorney that she was being given access the entire city attorney's file Further, defense was based on the statements made by both the city attorney and Mr Malloy In none of the materials received by Defendants prior to trial and in no conversations with either the city's attorneys nor Mr Malloy was the Defendant ever informed that the City intended to call a Roger Gonzales as a witness

E At trial on May 19, 1997, Mr Malloy stated that Roger Gonzales had taken the relevant

photos that the city submitted as evidence, contrary to the representations he had previously made at pretrial to the Defendant. Mr. Malloy further stated the lack of any standard definition for any term in any of the zoning ordinances in this case. What is perceived as junk to one zoning officer might not be perceived as junk to another zoning officer. The city then proceeded to call Roger Gonzales as a witness after indicating to the Appellant that Mr. Malloy would be the only witness. Ms. Patton objected to the admission of Mr. Gonzales' testimony inasmuch as they were entirely unprepared to cross-examine him on any matter, having relied on the City's representations regarding the contents of the City's file and the source of the photos. Ms Patton's objection was overruled because she had not filed an explicit written request for a list of witnesses. This despite the fact that the court had ordered the city to provide and the city had agreed to provide total discovery. Mr. Gonzales was the sole witness to testify that there was trash in the Appellant's yard on March 19, 1996. In ruling against the Defendant, the Court found insufficient evidence as to any matter testified to by Mr. Malloy, but specifically found that there was trash in the yard on March 19, 1996.

F. At sentencing on June 23, 1997, Ms. Patton presented a Motion for Arrest of Judgment and a Motion for New Trial, based on the Court's error in admitting the testimony of Mr. Gonzales. This motion was later denied.

RELEVANT FACTS

A. Extensive discovery was conducted prior to trial by the Defendants. Beginning at arraignment and continuing throughout preparation for trial the Plaintiffs were under Court Order to provide discovery. In Arraignment Hearing December 4, 1996 at 4:

B At Pretrial, the city attorney, Gary McGinn, assured the Court and Defendant's counsel that all matters in the city's file would be provided to the defendants At that time the city's main witness, Anthony Malloy, in the presence of Mr McGinn, told the defendants and counsel that he would be the only witness for the city, and that he had taken all relevant photos Malloy had also made written statements to Mr McGinn, prior to the filing of the complaint stating that he, Malloy, had taken all relevant photos (Transcript of Sentencing Hearing, page 3) At Pretrial, the city attorney, Gary McGinn, assured the Court and Defendant's counsel that all matters in the city's file would be provided to the defendants At that time the city's main witness, Anthony Malloy, in the presence of Mr McGinn, told the defendants and counsel that he would be the only witness for the city, and that he had taken all relevant photos Malloy had also made written statements to Mr McGinn, prior to the filing of the complaint stating that he, Malloy, had taken all relevant photos (Transcript of Sentencing Hearing, page 3) This document was provided to defendants in the course of discovery Defendant prepared his defense based upon a thorough inspection of the city attorney's file, and on the statements made by both the city attorney and Mr Malloy In none of the materials received by Defendants prior to trial and in no conversations with either the city's attorneys nor Mr Malloy was the Appellant ever informed that the City intended to call a Roger Gonzales as a witness (Trial Transcript, pages 64-65)

At trial on May 19, 1997, contrary to his prior written and verbal statements, Mr Malloy stated that Roger Gonzales had taken the relevant photos that the city submitted as evidence (Trial Transcript, page 14) The city then proceeded to call Roger Gonzales as a witness Ms Patton objected to the admission of Mr Gonzales' testimony inasmuch as they were

entirely unprepared to cross-examine him on any matter, having relied on the City's representations regarding the contents of the City's file and the source of the photos. Defendant's objection was overruled upon the court's finding that Appellant had not filed an explicit written request for a list of witnesses. (Trial Transcript, pages 64-66). Mr. Gonzales was the sole witness able to testify as to any specific items in the Appellant's yard that might have constituted garbage on March 19, 1996. (Trial Transcript, pages 68-74). In ruling against the Appellant, the Court found insufficient evidence as to any matter testified to by Mr. Malloy and also as to any matter alleged to be shown in the photos, but specifically found that there was garbage in the yard on March 19, 1996. (Trial Transcript, pages 114-116, 120-121).

At sentencing on June 23, 1997, Appellant presented a Motion for Arrest of Judgment and a Motion for New Trial, based on the Court's error in admitting the testimony of Mr. Gonzales. Both Motions were ultimately denied on August 4, 1997. (Trial Index, page 42).

SUMMARY OF ARGUMENT

I. When discovery is voluntary, the prosecution has an affirmative duty to provide the defense with any inculpatory evidence prior to trial, including any witnesses the prosecution intends to call. Under these circumstances, the defense does not have to make a formal, specific request. The prosecution also has a duty not to mislead the defense. In this case, Provo City failed to provide the Defendant, William Patton, with a list of witnesses and made several written and verbal representations that misled the defense into believing that Anthony Malloy would be the city's sole witness. This constituted error on the city's part, compounded when the court

erroneously ruled that the city had no duty to provide the defense with a witness list.

II. Defendant timely objected to allowing the surprise witness, Roger Gonzales, to testify at trial, and repeated those objections in post-trial motions. Inasmuch as the prosecution had erred in failing to notify the defense of its intent to call Mr. Gonzales, the court erred under Rule 16(g) and Rule 30 of the Rules of Criminal Procedure in failing to exclude Mr. Gonzales testimony and failing to grant Defendant's post-trial motions.

III. The court's error in admitting Mr. Gonzales' surprise testimony completely prejudiced Defendant's case. Defendant was unable to prepare to meet the testimony. The evidence is ample that the defendants thoroughly prepared for such evidence as they were apprized of in discovery. The entire conviction was based solely on the testimony of the surprise witness. The court therefore erred in admitting this testimony, and further erred in refusing to grant a new trial or arrest of judgment. The error was thus sufficient to undermine confidence in the validity of the proceeding and provides ample cause for reversal.

ARGUMENT

I

DID THE PROSECUTION HAVE A DUTY TO PROVIDE DEFENDANT WITH A LIST OF ALL WITNESSES PRIOR TO TRIAL.

Discovery in a criminal case is governed by Rule 16 of the Rules of Criminal Procedure, which states in pertinent part as follows:

> (a) Except as otherwise provided, the prosecutor shall disclose to the defense upon request the following material or information of which he has knowledge:
>
> (1) relevant written or recorded statements of the defendant or co-defendants;
>
> (2) the criminal record of the defendant;
>
> (3) physical evidence seized from the defendant or co-defendant;
>
> (4) evidence known to the prosecutor that tends to negate the guilt of the accused, mitigate the guilt of the defendant, or mitigate the degree of the offense

for reduced punishment; and

(5) any other item of evidence which the court determines on good cause shown should be made available to the defendant in order for the defendant to adequately prepare his defense. (emphasis added)

(b) The prosecutor shall make all disclosures as soon as practicable following the filing of charges and before the defendant is required to plead. The prosecutor has a continuing duty to make disclosure.

. . .

(e) When convenience reasonably requires, the prosecutor or defense may make disclosure by notifying the opposing party that material and information may be inspected, tested or copied at specified reasonable times and places.

In a case such as Defendant's, where the specific evidence requested does not fit any of the detailed descriptions in subsections (a)(1) through (a)(4), which mandate disclosure upon request, subsection (a)(5), the catch all provision, applies. While the wording of subsection (a)(5) might suggest that it requires disclosure of the material sought only to the extent ordered by the court, the law is clearly established that when the prosecution chooses to respond voluntarily to a request under subsection (a)(5) without requiring the defense to obtain a court order, the prosecution cannot respond in a manner that it is misleading. *State v. Knight*, 734 P.2d 913, 916 (Utah 1987). In fact, the aspect of "good cause . . . which the court determines" applies only in cases where the prosecution explicitly refuses to provide discovery and the defense must compel discovery by order of the court. *Salt Lake City v. Reynolds*, 849 P.2d 582, 585 (Utah App. 1993). This duty to provide discovery is ongoing. *State v. Carter*, 707 P.2d 656, 662 (Utah 1985); *State v. Knight*, 734 P.2d 913, 917 (Utah 1987); *State v. Begishe*, 937 P.2d 527, 530 (Utah App. 1997); Rule 16(b), Rules of Criminal Procedure. This is especially so when discovery is voluntary. *State v. Kallin*, 877 P.2d 138, 142 (Utah 1994).

When discovery is voluntary, the prosecution has an affirmative duty not to mislead the defense, and specifically to provide inculpatory evidence. *State v. Begishe*, 937 P.2d at 532. In *Begishe* the defense's opening statement at trial, based on pre-trial discovery, was that the prosecution had no tangible evidence linking the defendant to the alleged rape of a child. After the

trial had begun, the prosecutor attempted to discredit this statement by sending the alleged victim's panties to the crime lab for additional testing. The defendant's only opportunity to counter the evidence was through frantic efforts between trial sessions. 937 P.2d at 529. In *Salt Lake City v. Reynolds*, the city failed to completely respond to the defendant's discovery request, but also failed to inform the defense that it was refusing to provide all requested information. The defense did not attempt to compel discovery because the prosecution's conduct had misled them to believe they had no reason to do so. 849 P.2d at 585. In *State v. Knight*, the prosecution offered to provide all discovery voluntarily under an "open file" policy. The defense specifically inquired as to certain witnesses and was repeatedly assured that they would not be called at trial. Nevertheless, on the day of trial, those witnesses were called. The defense had no opportunity to prepare and was misled into preparing a trial strategy different from what the situation demanded. 734 P.2d at 916. This is particularly parallel to the situation in the present case. At arraignment, the prosecution declared that it would provide all discovery materials to the defendants. (Arraignment transcript, page 5). At pretrial, the city attorney, Gary McGinn, reaffirmed his intention to provide the defense with all materials in the file (Sentencing transcript, pages 3-5), and at trial he was adamant that he had done so. (Trial transcript, page 64). The discovery materials provided to both defendants contained no witness list whatsoever. They did, however, contain a memorandum from the city inspector, Anthony Malloy, to Mr. McGinn stating that Malloy had taken all the relevant photos. Consistent with this document, and in response to the direct question at pretrial of both Mrs. Patton and Mr. Humiston as to who the city's witnesses would be, both Mr. Malloy and Mr. McGinn clearly represented that Mr. Malloy would be the only witness. (Sentencing transcript, pages 3-5). The defense thus had no indication that any other witnesses would be called and no reason to inquire any further.

While the defense has a duty to pursue discovery diligently (*State v. Kallin*, 877 P.2d 138, 143 [Utah 1994]), an inadequate response by the prosecution will logically lead the defense to infer that there is no further information. *Salt Lake v. Reynolds*, 849 P.2d at 582.

When Roger Gonzales was presented as a witness at trial, both defendants objected vehemently. (Trial transcript, pages 62-66). The court ruled, however, that the city had no obligation to notify the defense of the city's intention to call Mr. Gonzales, as the record contained no specific request for witnesses. (Trial transcript, pages 65-66). As is clear from *Knight* and the numerous related cases, there was no need for a specific request for a witness list, and the prosecution had a positive duty not to mislead the defense. The court's ruling was thus clearly incorrect, and the conduct of the prosecution was improper.

II

DID THE TRIAL COURT ERR IN OVERRULING DEFENDANT'S OBJECTION TO INTRODUCTION OF THE SURPRISE TESTIMONY OF ROGER GONZALES, AND IN DENYING DEFENDANT'S MOTION FOR NEW TRIAL AND MOTION FOR ARREST OF JUDGMENT SO PREJUDICE DEFENDANT'S CASE AS TO UNDERMINE CONFIDENCE IN ITS VALIDITY AND WARRANT REVERSAL.

The court broad discretion in remedying abuses of discovery. *State v. Pena*, 869 P.2d 932, 938 (1994). Rule 16 of the Rules of Criminal Procedure states:

> (g) If at any time during the course of the proceedings it is brought to the attention of the court that a party has failed to comply with this rule, the court may order such party to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other order as it deems just

under the circumstances.

However, the "effective administration of justice requires that discoverable evidence be provided much sooner than 'moments' before trial." *State v. Begishe*, 937 P.2d at 532.

Rule 30(a) provides:

> Any error, defect, irregularity or variance which does not affect the substantial rights of a party shall be disregarded.

When it is clear, as it is here, that the defense had exercised all reasonable diligence in discovery and properly preserved all objections, the two questions the court must answer are whether admission of the surprise testimony was error, and whether that error was prejudicial. *State v. Knight*, 734 P.2d at 916. It has already been clearly established that allowing the testimony was error, and the sole question remaining is whether that error was sufficiently prejudicial to warrant reversal. *State v. Carter*, 707 P.2d 656, 662 (1985).

An error is prejudicial if there is a reasonable likelihood that, but for the error, the defendant would have obtained a more favorable result at trial. *Knight*, 734 P.2d at 919. A "reasonable likelihood" is a probability sufficient to undermine confidence in the outcome of the trial. *Horrell v. Utah Farm Bureau Ins. Co.*, 909 P.2d 1279, 1282 (Utah App. 1996). The quantum of probability required to undermine confidence falls far short of "more probable than not". *Knight*, 734 P.2d at 920. *State v. Jacques*, 924 P.2d 898, 902 (Utah App. 1996). Indeed, when the defendant can make a credible argument that the prosecutor's errors have impaired the defense, the burden of proof shifts to the prosecution to show that the error was harmless. *Knight*, 734 P.2d at 921; *State v. Bell*, 770 P.2d 100 (Utah 1988).

In Defendant's case, it is clear that Gonzales' testimony was severely prejudicial. Three witnesses testified at trial: Anthony Malloy, Roger Gonzales, and Brent Keller. The bulk of Mr.

Malloy's testimony regarded abandoned and junked vehicles (Trial Transcript, pages 26 through 56) As a result of discovery, the defendants had opportunity to prepare for this testimony, as is clear from the extensive questions asked by Mrs Patton *Id.* As a result, the court rejected virtually all of Mr Malloy's testimony, and specifically found that there was insufficient evidence on the issue of junked vehicles (Trial transcript, pages 114-115) While Mr Malloy did testify vaguely as to "junk" in the yard, upon repeated cross-examination he could not specify what that "junk" consisted of (Trial transcript, pages 24, 44-45, 62) Indeed, he openly stated, "I do not recall specifics", *Id.* at 24, and "I do not recall specifically what was in the front yard area", *Id.* at 62 Mr Keller did not testify as to any items in the Patton's yard *Id.* at 87-99 Mr Gonzales, however, testified very specifically as to "wood and lumber scraps" in the yard *Id.* at 68-74 He also testified, contrary to the written and verbal statements provided in discovery, that he had taken all the relevant photographs *Id.* at 67-68

In contrast to the examination of Mr Malloy, Mrs Patton was completely unprepared to ask Mr Gonzales any questions, as the court specifically noted (Trial transcript, pages 70-71, Mr Humiston "I'm going to question him on behalf of Mrs Patton, but I guess she doesn't have any questions prepared because we did not know about this witness", The Court "I want the record to reflect that") Mr Humiston examined Mr Gonzales as best he could, being equally unprepared *Id.*, pages 71-74 It is significant that in the end the court found the testimony regarding junked vehicles, which was the bulk of Mr Malloy's testimony, inconclusive *Id.* page 114 It also disregarded all of the photographs *Id.* pages 114-115 The court found only that there was trash, specifically firewood, in the yard, and this was a matter that only Mr Gonzales had testified to *Id.*, pages 115-116 The court was very specific in limiting its finding to the trash *Id.* pages 120-121

Had the defense had any notice whatsoever of the city's intention to call Mr Gonzales, it could have adequately prepared to address his testimony Unfortunately, none of the matters on which Mr Gonzales would have been questioned appear in the record, as the defense did not have that opportunity If the nature of an error prevents the court from clearly determining the effect of the error, the burden is upon the prosecution to show that the error was harmless *State v. Bell*, 770 P 2d 100, 106 (Utah 1988) Clearly, the city cannot do so in this case

In determining whether a witness' testimony is sufficiently prejudicial to require reversal, a number of factors must be considered

1 The importance of the witness to the prosecution's case,

2 Whether the testimony is cumulative,

3 The presence or absence of corroborating or contradicting testimony,

4 The extent of cross-examination, and

5 The overall strength of the case

State v. Jacques, 924 P 2d 898, 902 (Utah App 1996), *State v. Hackford*, 737 P 2d 200 (1987)

It is clear that Mr Gonzales' testimony was crucial to the city's case There was no specific testimony regarding trash other than his testimony, and virtually no corroborating evidence Cross-examination was limited by the element of surprise, and all other evidence other than Mr Gonzales' testimony was disregarded by the judge

It is thus clear that the court erred in allowing Mr Gonzales to testify, and that error requires reversal

III

DEFENDANT HAVE A RIGHT TO RELY ON THE STANDARDS OF ENFORCEMENT SET BY A COURT OF COMPETENT JURISDICTION DURING PRIOR CASES.

This appeal results from the fourth trial and conviction of the defendant, Joan Patton for a violation relating to the appearance and upkeep of her property. In rendering a guilty verdict the Circuit or District Court in each conviction established certain levels of compliance that Ms. Patton was required to meet and maintain with the City being given enforcement ability of those set standards. In the time that followed each conviction Ms. Patton has strived to continue to improve upon the set standard. Yet time and again Provo City has changed the standard and level of compliance set by the Court and charged Ms. Patton with violation of the enhanced standard.

The party that set the standard, the Trial Court Judge, had the authority to set the standard of compliance. The Judge also had the authority to give the City and its agents authority to enforce that standard. Ms. Patton had a right to rely on the set standard. In relying on the standard set by the Judge Ms. Patton acted to keep her property in compliance with the standard. Ms. Patton was never informed that the standard of compliance could or would be changed. In relying on the Court set standard of compliance with this action her compliance has been to her damage and detriment as the City by and through its agents have changed the standard Ms. Patton had the come to rely upon causing her damage. When a city or person with authority to do so sets a standard that is relied upon to the detriment of another when the standard is changed that city or person is precluded from enforcing that changed standard. Provo City had a duty to inform Ms. Patton of changes in enforcement. *Almon, Inc. v. Utah Liquor Control Comm.*, 696 P.2d 1210 (Utah 1985), and *Sun Ray Drive-In Dairy v. Oregon Liquor Control Commission*, 517 P.2d 289

(Or. 1973), and 2 *Sun Ray Drive-In Dairy v. Oregon Liquor Control commission*, 530 P.2d 887 (Or. 1975), and *Accord Athay v. State*, 626 P.2d 965 (Utah 1981).

Provo City should be estopped from enforcing the changed standard of compliance. *Schneider v. US*, 119 F.2d 215 quoting *R.H. Stearns Co. v. US*, 241 US 54 at page 61, "Sometimes the resulting disability has been characterized as an estoppel, sometimes as a waiver. The label counts for little. Enough for present purposes that disability has its roots in principle more nearly ultimate than either waiver or estoppel, the principle that no one shall be permitted to found any claim upon his own inequity or take advantage of his own wrong."

IV

DID THE TRIAL COURT ERR IN REFUSING TO ALLOW EVIDENCE OF A COURT ESTABLISHED STANDARD.

The Prosecution is barred in legal theory and by evidentiary rules with few exceptions from bringing evidence of prior convictions in an effort to assert the truth of the matter then at hand, but when the shoe is on the other foot the Defendant is not similarly barred. The basic elements of the evidentiary and procedural rules are to effect fundamental fairness and an even field of play. *Wiscombe v. Wiscombe*, 744 P.2d 1024 (Utah App. 1987) Defendant case was remanded for further hearing upon Courts failure to hear his arguments in his defense. "Due process rests on concept of basic fairness," *Rupp v. Grantsville City*, 610 P.2d 338 (Utah 1980). Due process requires opportunity to be fully heard, *Worrall v. Ogden Fire Dept.*, 616 P.2d 598 (Utah 1980).

V

THE ORDINANCE SHOULD BE STRUCK DOWN AS VAGUE AS IT LACKS STANDARDS NECESSARY TO PREVENT ARBITRARY ENFORCEMENT.

On its face and/or in its application Provo City Ordinance in vague to the point that it

impedes the necessary due process requisite in actions such as in the instant case. "The due process doctrine of "void for vagueness" has two central principles. First, criminality must be defined with sufficient specificity to put citizens on notice concerning conduct they must avoid. And second, legislated crimes must not be susceptible of arbitrary and discriminatory law enforcement." *City of Seattle v. Webster*, 802 P.2d 1333(Wash. 1990), at 1339. In *Webster* the Washington Supreme Court was faced with a challenge of a Seattle City ordinance, SMC 12A.12.015(B)(1) Pedestrian interference, obstruction. "Petitioner City of Seattle contends that the ordinance is not unconstitutionally vague inasmuch as it includes an element of specific intent. The requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid.", *Webster* at 1339 which continued further, "SMC 12A.12.015(B)(1) provides adequate notice to persons of common understanding concerning the behavior prohibited *and the specific intent required*. It provides citizens, police officers and courts alike with sufficient guidelines to prevent arbitrary enforcement. It is not unconstitutionally vague." Emphasis added.

Unlike *Webster* in the instant case the Provo City ordinance Ms. Patton has been charged with violating has no element of specific intent. Also lacking are basic standards of enforcement or definitions to guide officers in their endeavor to properly apply the ordinances

B. THE ORDINANCE SHOULD BE STRUCK DOWN AS OVERBROAD AS IT MAKES CRIMINAL PROTECTED BEHAVIOR AND/OR ACTIONS.

The Provo City ordinance should be struck down as overbroad as it prohibits innocent intentional acts by its failure to include a specific intent clause. In *Webster* the Washington Supreme Court found that except for the inclusion of a specific intent clause the ordinance would have been overbroad, "The City of Seattle argues that inclusion in the ordinance of the element of

specific intent saves it from being unconstitutionally overbroad We agree In *Seattle v. Slack*, we held that the element of specific intent saved another Seattle Municipal Ordinance from unconstitutional overbreadth " 802 P 2d 1333 (Wash 1990), at 1338

C. THE ORDINANCE SHOULD BE STRUCK DOWN AS VOID FOR UNREASONABLENESS

"An ordinance which makes no distinction between conduct calculated to harm and conduct which is essentially innocent is an unreasonable exercise of the government's police power " *Webster*, at 1338 This ordinance unlike the Seattle ordinance makes no difference between intentional harm and leaving the bike your ten year old was riding which happens to be a bit rusty after six kids in the view of another who may judge it to be junk After all the Provo ordinance in the plain interpretation of its undefined word states that one or more such objects constitutes a junk yard Yet even though argued that a rusty bike may violate the ordinance a bike that was just purchased and is new with no rust of scratches ridden one time may be in violation as the ordinance in undefined terms states used objects

VI

THE ORDINANCE VIOLATES THE DEFENDANTS CONSTITUTIONAL RIGHTS IN ITS APPLICATION BY FAILURE TO PROVIDE EQUAL PROTECTION AND UNIFORM APPLICATION.

Ms Patton is a member of the extensively protected class of property owners The ordinance in its current application is to her detriment and violates the equal protection clauses of both the U S and Utah Constitutions The discrimination occurs because the ordinance is violated not by the Defendant's own actions, but on others own reactions to her property A person

affluent in nature who can afford that which is new will not be found in violation whereas the Defendant on a lower rung of the economic ladder will have his possessions and surroundings declared "junk" because of age and surroundings. Supported in part by *Malin v. Lewis*, 693 P.2d 661 (Utah 1984), and *State v. Pharris*, 846 P.2d 454 (Utah App. 1993).

CONCLUSION

The admission of surprise testimony despite the Prosecution's failure to fulfill his duty of discovery is enough to mandate a New Trial upon a finding of sufficiency in the ordinance itself. The clear violations of due process evident in this action which stem from an ordinance that because of its legislative inadequacies fails to provide clear standards of enforcement, a provision that requires specific intent leaves little room to deem the ordinance sufficient and calls for reversal. As state so eloquently over a century ago and holding true today in *City of Los Angeles v. Cohn*, 35 P. 1002 (Calif. 1894), at 1004 "If we concede the existence of the principle of estoppel in pais against the public in certain exceptional cases, then this case is rightly decided, for this is an exceptional case. If this character of estoppel may be pleaded where justice and right require it, then it may be successfully pleaded in this case, for justice to these defendants demands it. There are limits beyond which even a city, in representing the rights of the public, may not go, and we think the city, in the present action, has gone beyond those limits."

DATED this 2nd of February 1998.

Joan Patton

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 27 of the Utah Rules of Appellate Procedure, I mailed two copies of the attached Brief of Appellant to each of the following this 2nd day of February, 1998:

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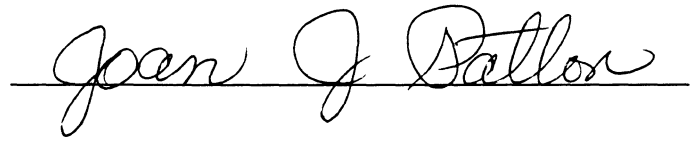

MR. ROMNEY: Your Honor, actually it's Mr. McGinn's case. He handles the zoning portion matters, but I don't think very long.

THE COURT: Is that going to be adequate time with that pre-trial? Could it be mailed to them?

MR. ROMNEY: Sure. I'll just ask Mr. McGinn to send them discovery. We know the address.

THE COURT: Would that be adequate, Ms. Patton? I'll have them mail you a copy of the materials they have, and I think they can get that done before this date. And then we'll come back on the pre-trial conference date for further discussion. That would not be a trial date, that would just be a date to discuss the case to see what we can do about it. Would that be agreeable with you?

MS. PATTON: Yes. May I also have it read into the record, then, that in the event that I choose to represent myself, may I speak for Mr. Patton as well?

THE COURT: Ordinarily you may not, because that's a practice of law. But we'll see what we can do -- we may not get to that point, so let's see what can be done at the pre-trial, okay?

MS. PATTON: All right.

THE COURT: Anything else, Mr. Romney?

letter?

A. The notice states the specific ordinances which they are in violation of, describes what will need to happen in order for compliance to be met, and I notified them on that that if they did not contact me within a specific time frame that the file would be forwarded to the city attorney's office for legal proceedings.

Q. At that point what did you do next?

A. That was mailed March 11th. I did not receive a response, and on March 19, 1996 I went out to the site once again with another zoning officer, Roger Gonzalez, in order to take photos that would document the specific violation that I was preparing to send to your office -- to the city attorney's office for legal proceedings.

Q. And that was what date again?

A. That was March 19th. March 20, 1996 I sent a letter to William and Joan Patton informing them that the file had been sent to the city attorney's office for legal action.

I neglected -- I'm sorry, and can I add something?

THE COURT: Go ahead.

THE WITNESS: I neglected to mention that

look at what's been marked as City's Exhibit No. 1. Do you recognize that photo?

A. I do.

Q. What is that a photo of?

A. This is a photo of the house that according to the Utah County Recorder's Office is owned by William and Joan Patton.

Q. When was that photo taken?

A. It was taken on March 19, 1996.

Q. Who took that photo?

A. Actually Roger Gonzalez took that photo.

Q. Were you with him at the time that photo was taken?

A. I was with him.

Q. Does that photo accurately and fairly represent the state of the property on that date, March 19, 1996?

A. It does.

MR. MCGINN: Your Honor, may I approach the witness again?

THE COURT: Yes, sir.

Q. BY MR. MCGINN: I'm handing you what's been marked as Plaintiff's Exhibit No. 2. What is that?

A. This is another photo of the property owned by William and Joan Patton, taken March 19, 1996.

CROSS EXAMINATION

BY MS. PATTON:

Q. Mr. Malloy, what vehicles are in violation of the ordinance?

A. Specifically on that date? On the subject lot that we're discussing today there is a trailer parked in the front yard area that is, in my opinion, was inoperable, and violates Section 14-34-080.

Q. And that's the only vehicle that you find in violation?

A. On this lot at this time, that is correct.

THE COURT: When you say, "this time," what time frame are you talking about?

THE WITNESS: I believe we're addressing March 19th, is that right, or are we discussing today?

THE COURT: No, that's correct. That should be the date you're speaking of.

THE WITNESS: It was.

Q. BY MS. PATTON: Is the vehicle wrecked?

A. In my opinion it was inoperable and unlicensed.

Q. Is there a definition of a wrecked vehicle or an unlicensed vehicle (inaudible) city code?

A. I'm not sure if there is or not.

Q. Is there a definition of a wrecked vehicle

in the state code?

A. I'm not sure.

Q. Is there a definition of a wrecked vehicle in the policy and procedure of -- for your department?

A. In Section 14-34-080 it does describe certain vehicles that would be considered a violation of that section of the ordinance.

Q. (Inaudible).

A. 14-34-080.

Q. Did you check to see if there was an accident report filed on this vehicle?

A. I did not.

Q. Do you know if there's an accident report on file for this vehicle?

A. I do not.

Q. Was there a report from a garage or a body shop that this vehicle was in for repairs and did not have a accident damage sticker?

A. I do not recall if I received any.

Q. Is it a subjective judgment by the zoning officer as to whether the vehicle was wrecked?

A. I do not believe so. If it's inoperable that is evident -- it has flat tires that are on the vehicle for a period of one year or several months, then I would say it pretty well indicates that it's

inoperable. If it's unlicensed -- if it's licensed then there should be tags on the vehicle showing that it is licensed.

Q. Is there an occasion for one zoning officer when they find a vehicle wrecked (inaudible) another, both find the same vehicle to (inaudible) is there an occasion where one zoning officer may find a vehicle wrecked while another will not find the same vehicle to be wrecked?

A. I can only account through how I would visually see it, but I can't answer for somebody else.

Q. Is the vehicle junked?

A. I would say it's inoperable.

Q. Is there a definition of a junked vehicle in the city code?

A. I do not know if there is.

Q. Is there a definition of a junked vehicle in the state code?

A. I do not know if there is.

Q. Is there a definition of a junked vehicle in your department's policy and procedure?

A. I do not know if there is other than what is described in Section 14-34-080.

Q. Does faded paint make a vehicle a junk vehicle?

A. Alone they may not be a violation.

Q. Does a missing molding make a vehicle a junked vehicle?

A. I guess it would depend upon how extensive what was missing.

Q. Does a dingy look make a vehicle a junk vehicle?

A. I would say no.

Q. Does something have to be unusable to be junked?

A. According to this section of the ordinance when describing vehicles, it does not just reference junked vehicles, it says inoperative, dismantled, partially dismantled, unlicensed, et cetera.

Q. Is it a subjective judgment by the zoning officer as to whether the vehicle is junked?

A. If I'm assessing whether or not it's inoperable or junked, then I would say, yes, it is subjective to an extent. But if it's inoperable then it would be obvious to me or other people I would imagine. But once again, I cannot answer how somebody else would see something.

Q. Is there an occasion where one zoning office may find a vehicle junked while another will not find the same vehicle to be junked?

A. I think I answered that, and I couldn't answer how somebody else would see something.

Q. Is the vehicle partially dismantled?

A. Is the vehicle partially dismantled?

Q. The trailer we're talking about.

A. I cannot see what's in the back of the trailer. When we were just meeting on Friday I did point out, too, that the vehicle was -- well, last Monday that it wasn't -- did not have tags that I could see showing it was licensed, and it did not have tires that -- you know, that they could be used, it had flat tires.

Q. Is there a definition of partially dismantled in the city code?

A. I'm not aware if there is or not.

Q. Is there a definition of partially dismantled in the state code?

A. I'm not aware if there is or not.

Q. Is there a definition of partially dismantled in your department's policy and procedure?

A. I'm not aware if there is or not.

Q. Did you verify that this vehicle was dismantled in accordance with the state code?

A. I did not.

Q. Did you verify that there was a license to

dismantle, as required by state code?

A. I did not. What I filed on (inaudible) was a violation of Section 14-34-080, which would include not only that the vehicle is dismantled, but also that it is inoperative, not licensed. Any one of those issues would be a violation of that section of the ordinance, and require the vehicle to either be moved off the lot or placed behind the fence or in a building, not in the front yard set back.

Q. Did you inform public safety officers or the prosecutor attempting to dismantle a vehicle without proper license may be violated?

A. I did not.

Q. Can a vehicle be operable and partially dismantled?

A. With this specific vehicle I would say that it would be hard to operate it with flat tires.

Q. How many flat tires did you see?

A. I believe I -- if I recall correctly there were two.

Q. Did you verify whether the Pattons were operating this vehicle?

A. Prior to March 19th or as of this date, no, I did not.

Q. As of this date.

A. I did not. I had not received any personal contact with you at that point in time, nor had I tried to initiate physical contact because of the sign that is posted on your property that informs agents -- that informs local agencies and representatives to not enter your property.

Q. Is it a subjective judgment by the zoning officer, such as yourself, as to whether the vehicle is partially dismantled?

A. I would say that in part that may be the fact, but again, it would be quite objective as far as being able to see visually whether it is dismantled or not.

Q. Is the vehicle inoperable?

A. I would say, yes, it is.

Q. Is there a definition of inoperable in the city code?

A. I'm not aware if there is or not.

Q. Is there a definition of inoperable in the state code?

A. I'm not sure whether there is or not.

Q. Is there a definition of inoperable in your department's policy and procedure?

A. I'm not sure whether there is or not.

Q. Are you aware of whether or not Provo City

has adopted certain state codes into the city code in their entirety?

A. I'm not sure whether they have or not.

Q. Are you familiar with this book?

A. I am.

MS. PATTON: May I approach, your Honor?

THE COURT: You may.

Q. BY MS. PATTON: Would you please identify and read the first marked passage on the following page, 942, "Provisions of the Motor Vehicle Act Adopted," please, right there.

MR. MCGINN: Your Honor, objection, relevancy. I'm not following the relevancy of this.

THE COURT: You're asking him to read--

MS. PATTON: Just one paragraph, your Honor.

THE COURT: And cite again what you're asking him to read.

MS. PATTON: I'm asking him to read on page 942-010, "Provisions of the Motor Vehicle Act Adopted."

THE COURT: That is not 14-34-080?

MS. PATTON: No, it is not.

THE COURT: Would you address, please, the objection with respect to relevancy then? Ms. Patton, the objection on relevancy.

MS. PATTON: If you'll just give me a little leeway, your Honor, I can tie all this in.

THE COURT: Well, I'll give you all the leeway that you need, but you'll comply with the rules just like Mr. Humiston has to comply with them. And we have an objection to the question on relevancy, and I'm asking you to demonstrate and tell me why it's relevant, and if it's not relevant he doesn't have to answer it. If it is relevant he does have to answer it.

MS. PATTON: According to my perception, which may not always be good, your Honor, it's my understanding that Provo City adopted this ordinance into their code from the State.

THE COURT: Read what she's asked you to read.

THE WITNESS: The title for this section is "Police Ordinances, Provisions of the Motor Vehicle Act Adopted." Should I proceed to read the--

Q. BY MS. PATTON: Just only that which is marked. There's just one little -- right there, your Honor.

THE COURT: Has he read what you've asked him to read?

THE WITNESS: Do you want me to read it all?

THE COURT: The question--

MS. PATTON: Just what's underlined.

THE WITNESS: Just what's underlined?

THE COURT: The question to you is to read whatever she's asked you to read. I deny the objection. Go ahead and read what she's asked you to read.

THE WITNESS: "The Motor Vehicle Act, Chapter 1 of Title 41, Utah Code as amended is hereby adopted as a Provo City Ordinance."

Q. BY MS. PATTON: Mr. Malloy, are you familiar with this book?

A. Somewhat familiar.

MR. HUMISTON: State for the record that she's identified the Utah Code, I believe Section 41.

THE COURT: Well, she hasn't identified anything yet other than the book in her hand.

MS. PATTON: I just want to know if he recognized the book. It is the Utah Code Annotated Volume II, for the record.

May I approach again, please

THE COURT: You may.

Q. BY MS. PATTON: Mr. Malloy, would you please identify and read the first marked passage on the following page, 41-1A-1009.

MR. MCGINN: Your Honor, could I have a moment to get there myself?

THE COURT: Yes, sir. State it again, will you please, Ms. Patton?

MS. PATTON: 41-1A-1009.

THE COURT: Go ahead, sir. Do you have it?

THE WITNESS: I do. "Abandoned and inoperable vehicles, vessels and outboard motors determination by commission disposal of vehicles. 1, a vehicle vessel or outboard motor is abandoned and inoperable when a) the vehicle, vessel or outboard motor has been inspected by an authorized investigator or agent appointed by the commission, and b) the authorized investigator or agent has made a written determination that the vehicle, vessel or outboard motor cannot be rebuilt or reconstructed in a manner that allows its use as designed by the manufacturer."

Q. BY MS. PATTON: Are you an authorized investigator or agent of the state tax commission?

A. I am not.

Q. Was the determination of inoperability made in accordance with that state code?

A. This state code references specifically abandoned and inoperable vehicles. Section 14-34-080 goes beyond only referencing abandoned and/or

inoperable vehicles. So you were cited for the violation of Section 14-34-080, which in my opinion, includes other areas than just being abandoned or inoperable.

Q. So you're saying that the city code overrides the state code; is that what I'm hearing you say?

A. What I'm saying is what I specifically cited you for the violation of. If you're asking for an interpretation of what the City's policy is, I cannot answer that.

Q. Does the City have a written policy for--

A. I'm not aware if there is or not.

Q. Has there been a request for the determination of inoperability under that state code that you--

A. As far as I'm aware there has not been.

Q. With no other definition of inoperable, has this vehicle been determined to be inoperable by you -- by yourself?

A. In my opinion, yes, it is inoperable.

Q. Did you ever ask the Pattons if the vehicle was operable?

A. As I've expressed to you, prior to this date I was not in a position to speak with you, nor had I

received any response from you to the letters that I had sent to you in order to ask you in regards to that specific question.

Q. Is the vehicle abandoned?

A. I would say it's more than likely not abandoned.

Q. So your answer is no?

A. Correct.

Q. Is the vehicle licensed?

A. I could not see anything that would reference it as being licensed.

Q. Does the ordinance make a distinction between licensed and unlicensed vehicles, or are they dealt with in this same manner?

A. They are not dealt with in this same manner. If the vehicle is unlicensed then according to this section of ordinance 14-34-080 on a residential lot a maximum of two vehicles may be maintained, but each vehicle must be either within a building or behind an opaque screening fence. If the vehicle is operable and licensed then the owner of the property is required to provide legal parking for that and all other operable vehicles that they own, or tenants own.

Q. Is the term "opaque" defined in the Provo City code?

A. I'm not aware of whether or not opaque is defined.

Q. Is the term "opaque" defined in the state code?

A. I'm not aware of whether or not opaque is defined in the state code.

Q. Is the term "opaque" defined in the policy and procedure?

A. Is the what, sorry?

Q. Excuse me. Is the term "opaque" defined in the city policy and procedure?

A. I'm not sure whether it is or not.

Q. Are opaque and sight obscuring the same thing?

A. I would say that they are.

Q. Does the Provo City code give a height requirement for an opaque screening fence?

A. It does.

Q. Does your department's policy and procedure give a height requirement for an opaque screening fence?

A. It does.

Q. Is non-sight obscuring defined as at least 50 percent open?

A. I'm sorry, could you repeat that?

Q. Yes, I surely could. Is non-sight obscuring defined as at least 50 percent open?

A. I believe so.

Q. Is any fence less than 50 percent open considered to be sight obscuring?

A. Is any fence less than 50 percent open considered sight obscuring?

Q. Yes.

A. Not that I'm aware of.

Q. Is there a fence between the vehicle and the public street?

A. Between this specific vehicle?

Q. Yes.

A. There is -- well, there is a gate.

Q. Is there a fence between the vehicle and the adjoining property?

A. Is there a fence between this and the adjoining property?

Q. Uh-huh.

A. I believe there is.

Q. Is the fence sight obscuring?

A. There are numerous fences that we need to address. If we're not going to address the other property, then how can I possibly describe the fences that would separate the properties?

Q. I am referring simply to that (inaudible).

A. The fence that is along the front property line specifically in front of the vehicle, I believe, was intended to be sight obscuring. It's used as a gate, but over the years the fence has continued to dilapidate, and now as the photos depict, you can see that many of the slats in the chain link fence have either been moved or are in bad shape so that the fence itself more than likely would be -- the gate area more than likely would be 50 percent open.

Q. Was the vehicle in substantially the same position? I don't think this -- oh, maybe it will. Here we go. Was the vehicle in substantially the same position when the zoning officers approved compliance during defendant's 1994 probation for zoning violations?

A. I did not work for Provo City at that time, so I'm not aware.

Q. Was the vehicle in substantially the same condition as -- well, I'll ask this later. Would the City have had any (inaudible) authority and right under the probation to bring the property into compliance at defendants' expense had she not brought it into compliance?

A. I'm sorry, I didn't follow the beginning

part of what you said.

Q. Would the City have any enforced its authority and right under the probation to bring the property into compliance at defendants' expense had she not brought it into compliance?

A. What probation?

Q. Any probation. As an example, this type, if nothing was brought into compliance, then would the City enforce its right to say, "Take the trailer, take the fence down?"

A. I believe that that is what we have requested of you to either move the vehicle to another place on the lot or remove it from the lot to comply with Section 14-34-080.

Q. But the vehicle had been removed under (inaudible) defendants' last guilty verdict by the City if the vehicle was not in compliance at that time?

THE COURT: Ms. Patton, I don't have an objection, but I'm going to sustain it anyway.

My objection is that we are not here to discuss matters of prior hearings and any rulings with respect to whether there was a guilty or not guilty verdict, as you've characterized it. Please don't get into those.

Q. BY MS. PATTON: Has the standard for determining a vehicle's compliance changed between 1994 and present?

A. I did not work for Provo City in 1994, so I couldn't answer for that. In my opinion since I started with Provo City in November of 1995 it has not changed.

Q. This is a 1996 (inaudible).

A. That is correct.

Q. So my question is, in 1994 has the compliance changed? Are you aware if the compliance has changed?

A. I would need to reference the 1994 ordinance and compare them to today's ordinance to know whether they have changed.

Q. Is the property presently in violation of sub section 3 of the Provo City Ordinance in Count I?

A. Could you show me a copy of that ordinance that we're referencing at this point?

THE COURT: It's 14-34-080 Section 3? Is that what you're talking about?

MS. PATTON: Uh-huh.

COURT CLERK: (Inaudible).

THE WITNESS: You said sub section 3?

Q. BY MS. PATTON: Yes.

A. Should I read that?

Q. You're welcome to.

A. "No trash, used materials, junk, household furniture, appliances, scrap material, equipment or parts thereof shall be stored in an open area. The accumulation of more than one such item constitutes a junk yard as defined in Chapter 14-06, Provo City Code, and must be removed from the property, stored within an enclosed building, or be properly located in an M-2 zone."

Because I have not been on the subject lot, I do not know what is in the backyard area. There is a sign, as I've described before, that prohibits me from going on the site to determine what is in the backyard. Because I have not been on the site nor seen what's in the backyard I cannot answer that adequately in response to your question.

Q. Does the yard have trash on it?

A. I'm sorry, what's that?

Q. Does the yard have trash on it?

A. As I just said, I cannot determine what's in the backyard area because I have not been--

Q. On what you have seen.

A. In the front yard area I have not seen it as today's date. On March 19, 1996, however, there was

other materials that I referenced by sub section 3. There were materials in the yard area.

Q. Does the yard have used materials in it?

A. When?

THE COURT: We're talking about 3/19/96?

MS. PATTON: Uh-huh, that's correct.

THE WITNESS: Yes, there were at that point in time materials in the front yard area. Again, I do not know what was in the backyard area.

Q. BY MS. PATTON: Is the term "used material" defined in the Provo City Code?

A. I'm not aware of whether it is or not.

Q. Is the term "used material" defined in the state code?

A. I'm not sure whether it is or not.

Q. Is the term "used material" defined in the department's policy and procedure?

A. I'm not sure whether it is or not.

Q. Does the term relate to items used in building structures?

A. Does the term or does the ordinance?

Q. Does the term (inaudible) the word material?

A. It may well refer to materials used for construction.

Q. Does the term relate to previously utilized

fabric?

A. It may well reference that.

Q. The ordinance has a term "used material" in a plural form in the ordinance violated if a singular used material is present.

A. I'm sorry, I don't follow what you're saying.

Q. It says, "used materials." Was there used materials upon that date?

A. I would say, yes, there were.

Q. Is it possible that the used materials that you alleged observed were in fact a trailer loaded with junk to be taken to a landfill?

A. In the front yard area?

Q. You have two pictures, correct?

A. I do.

Q. Exhibit 1 and Exhibit 2?

A. Uh-huh, that is correct.

Q. There are some trailers that you've given testimony to?

A. That is correct.

Q. Okay, my question then of those trailers, is it possible that the used materials that you allegedly observed were in fact a trailer loaded with junk to be taken to a landfill?

A. That material was present and you are correct, but there were other items in the yard area in addition to the materials in the trailers.

Q. Is it a subjective judgment by the zoning officer as to whether things are used materials?

A. In some ways I guess that it could be.

Q. Does the yard have junk on it?

A. It did.

Q. Is the term "junk" defined in the Provo City Code?

A. I'm not aware of whether it is or not.

Q. Is the term "junk" defined in the Utah State Code?

A. I'm not aware of whether it is or not.

Q. Is the term "junk" defined in the department's policy and procedure?

A. I'm not sure whether it is or not.

Q. Is it possible that the junk you observed was loaded on a trailer for disposal at the landfill at its earliest opportunity?

A. Some materials were, as I said just a minute ago, but there were definitely other materials in the yard area that were not loaded into a trailer, and were not going to be moved at the earliest convenience to a site other than the residence.

I have no idea what your intentions were for the materials since you did not contact me in response to my letters, but we're talking about several months. I would imagine in that time you would have had an opportunity, if it was at your earliest convenience, to move those in a two month period.

Q. Is it a subjective judgment by the zoning officer as to whether things are junk?

A. In some ways it may be.

Q. Does the property have household furniture on it?

A. I do not recall specifically whether there are household -- was household furniture on the lot.

Q. Is lawn furniture considered to be household furniture?

A. Lawn furniture, in my opinion, would not be characteristic of the same furniture you would use in your home.

Q. Is outdoor furniture considered to be household furniture?

A. No, it does not.

Q. Is there a definition of household furniture in the Provo City Code?

A. I'm not sure whether there is or not.

Q. Is there a definition of household furniture

in the Utah State Code?

A. I'm not sure whether there is or not.

Q. Is there a definition of household furniture in the department's policy and procedure?

A. I'm not sure whether there is or not.

Q. And is it a subjective judgment by the zoning officer as to whether things are household furniture?

A. Other than common sense of what is household furniture, then I would say that it is a subjective issue.

Q. Does the property have appliances on it?

A. On the lot or you mean in the yard area?

Q. In the yard area.

A. I have no idea what's in the backyard area, I have not seen it. I do not recall specifically what was in the front yard area other than recalling that there were definitely items in violation of that section, Section 14-34-080 in the yard area, March 19, 1996. Unfortunately I did not keep a log of specific items in the yard area on that date.

Q. Is it a yes or no answer to whether there's appliances on the property as far as what you could see?

A. As far as what I could see I don't recall.

Q. Does the yard have scrap material on it?
A. I would say yes, it did.
Q. Is the term "scrap material" defined in the Provo City Code?
A. I'm not aware of whether it is or not.
Q. Is the term "scrap material" defined in the Utah State Code?
A. I'm not sure whether it is or not.
Q. Is the term "scrap material" defined in the department's policy and procedure?
A. I'm not sure whether it is or not.
Q. Is it possible that your alleged scrap material was loaded on a trailer for disposal at the landfill at its earliest opportunity?
A. I guess it is possible that some of the items on those trailers were scrap material, but there is still definitely other materials on the subject lot at that time.
Q. Is it possible that your alleged scrap material was new material that hadn't been used yet?
A. Some of it may have been that, but in my opinion, there were other items on the lot that were scrap material.
Q. Is it the subjective judgment by the zoning officer as to whether things are scrap material?

A. In some ways, yes, it is.

Q. Does the yard have equipment or parts thereof on it?

A. Equipment or parts generally? From what I could see in the front yard area I would say yes, under that general term. Again, in the backyard I have no idea whether or not there was those materials, even though the ordinance does reference any open area. Because of physical limitations I could not see what was in the backyard.

Q. Is the term "equipment" defined in Provo City Code?

Q. Is the term "equipment" defined in Utah State Code?

A. I'm not sure whether it is or not.

Q. Is the term "equipment" defined in the department's policy and procedure?

A. I'm not sure whether it is or not.

Q. Is it a subjective judgment by the zoning officer as to whether objects are equipment?

A. Whether what?

Q. Is it a subjective judgment by the zoning officer as to whether objects are equipment?

A. Again, other than common sense of being able to identify whether an object is equipment or not, it

is a subject interpretation.

Q. Is there open areas within the boundaries of this property?

A. There is.

Q. Is the term "open areas" defined in Provo City Code?

A. I'm not sure whether or not it is.

Q. Is the term "open areas" defined in Utah State Code?

A. I'm not sure whether or not it is.

Q. Is the term "open areas" defined in the department's policy and procedure?

A. I'm not sure whether or not it is.

Q. Is the property exposed with an opaque or sight obscuring fence?

A. Not to the extent that it would screen the materials from the public right-of-ways or adjacent lots.

Q. Is the sight obscuring fence at least (inaudible) inches in height?

A. I have not measured specifically how high the fence is.

Q. If the area in question is behind the screening fence, is the area an open area in this lot?

A. I guess anything is possible if we're

speaking about what-if's. In this specific situation it is not enclosed, it is an open area in the front yard.

Q. Is it a subjective judgment by the zoning officer as to whether an area within a fence -- private yard is an open area?

A. This ordinance says that the junk needs to be inside of a building, so anything that's not inside of a building would be an open area.

Q. Has the defendant ever been charged with violations of Provo City Ordinances before now?

MR. MCGINN: Objection, your Honor.

THE COURT: Sustained.

Q. BY MS. PATTON: When you first started working for the zoning department approximately 17 months ago, were you handed an open file on Joan Patton?

A. I do not recall whether it was open or not. I was given the file, though.

Q. Of which you have been in (inaudible) up through this 17 months?

A. That's correct.

Q. Do you have any idea how old the fence is in question?

A. The fence on the subject lot?

Q. Yes, sir.

A. According to the information you gave me, it was in 1962 that it was put in, or there abouts.

Q. Is the fence in question acting as an opaque or sight obscuring structure required by another Provo City Ordinance?

A. The fence that is along the front property line of the property that you own with the residents on it?

Q. Yes.

A. It would not serve the purpose of being opaque or screening to the extent the ordinance would require to screen an inoperable vehicle.

Q. Have the Pattons' neighbors complained about the fence?

A. I have not spoken to any of the neighbors regarding your property.

Q. Does the fence pose a risk to health safety and welfare?

A. This same fence that we're speaking about?

Q. (Inaudible) utilizing the public streets and walks?

A. In my opinion probably not.

Q. Are certain neighbors in the city held to a higher zoning enforcement standards than others?

A. As zoning changes there are non-conforming rights that different property owners may have. In that situation, yes, some are held to a different standard than others.

Q. Are there differences in policy and procedure from neighborhood to neighborhood (inaudible)?

A. From zone to zone there are specific requirements.

Q. Is this the only property charged with a violation in this neighborhood?

A. With a violation in general or a specific violation?

Q. I'm the only one that's on my street that's been charged with property violations?

A. Period with any violation, that's what I'm asking, or specifically with this--

Q. For a zoning (inaudible).

A. No, you are not.

Q. How many are there on the street? Do you know?

A. I would need to check my records to see historically what we have worked with since I have worked in the city.

Q. Did (inaudible) of this property arise after

a citizen complaint?

A. I had received and have received several calls from concerned residents in regards to your property.

Q. And who would those residents be?

A. I don't have that information in front of me.

Q. But you do have it on file?

A. That is correct.

Q. Was a charge levied against this property because it had deteriorated to a level that existed at the time prior to the charge?

A. I cannot really answer that. When I started with the City I was given numerous cases and asked to investigate those, and one such case was your property. Because there had been previous work on it I did browse through the existing file, but did not use the material in there. I went out to the site and saw an existing violation and proceeded with my action as of that date in contacting you and requesting that the property be brought into compliance.

MS. PATTON: I have no more questions for the witness at this time, your Honor, but would like to reserve the right to inquire the witness further.

THE COURT: You may.

REDIRECT EXAMINATION

BY MR. MCGINN:

Q. Officer Malloy, forget about the trailer, forget about the trailer right now on this piece of property that we're talking about. Forget it's not there. On that day we're there, on March 19, 1996, was there scrap material, junk, garbage, trash in the front yard area constituting a violation?

A. There were.

Q. Is it possible that two different zoning officers could ever at one time go out to a piece of property and one officer miss a violation?

A. I would say that would be unlikely, but it could happen.

MR. MCGINN: No further questions.

THE COURT: You may step down.

May I see the exhibits, please? Do you have them right there? Thank you.

Call your next witness, will you, please?

MR. MCGINN: Mr. Roger Gonzalez.

THE COURT: Before Mr. Gonzalez testifies, Mr. Schriner and Mr. Means?

Ms. Patton, is there a problem?

MS. PATTON: Yes, I object, your Honor.

THE COURT: Object to what?

MS. PATTON: I asked him discovery who the witnesses would be, and Mr. Malloy said that they had no witnesses, your Honor.

THE COURT: Well, let me address--

MS. PATTON: Mr. McGinn, pardon me.

THE COURT: Let me address that in a minute. Why don't you have a seat.

Before we call the next witness, the case that was on before you folks has been resolved for some time. I want to dispose of it now so that these folks can go on their way.

(Short recess taken)

THE COURT: Thank you, folks, for the interruption.

Now Mr. McGinn, you were calling another witness?

MR. MCGINN: Yes, your Honor, Roger Gonzalez, and I believe they were objecting.

THE COURT: Ms. Patton, you had an objection. State your objection, will you, please?

MS. PATTON: I did not receive any discovery that Mr. Gonzalez was going to be a witness, therefore I have not had a chance to prepare.

THE COURT: I didn't see any scheduling order that said identification of witnesses.

Mr. McGinn?

MR. MCGINN: Your Honor, if I could respond to that.

THE COURT: Go ahead.

MR. MCGINN: Joan Patton has come into office several times. Our office has an open file policy. I believe Mr. Humiston, I believe also, has come in and asked for discovery. In our office if -- and to show them, in our file -- if they come in we'll allow them to look at the file, or we just make copies of everything that's in the file. We give everybody everything, there should be no secrets, that's our office policy and that's what we do.

With that, I know as Joan Patton has come in several times, we do have a cover sheet. It has a list of our officers that says, "Anthony Malloy, Roger Gonzalez from the zoning department." Anytime they come in and take a look that's there, and those are the orders that we give for them for people who--

THE COURT: When did the defendants first become aware of the name of Roger Gonzalez associated in this charge?

MS. PATTON: Just now, your Honor.

MR. HUMISTON: Your Honor, every document in this file was provided to me in discovery except the

one that Mr. McGinn is referring to. This is the first we've heard about Mr. Gonzalez.

I appreciate they do have an open file policy and (inaudible) very generous, but this issue has come up and we also find out for the first time that there were neighbor complaints, which issue was specifically addressed at the time of pre-trial. So I'm getting the impression that the open file policy has been less than entirely open.

MR. MCGINN: They've had access to everything I have and more. Joan's called me and asked me for -- or Ms. Patton has called me and asked me for files that community development's had that I've not had in my possession, given those files to her, she's been free to go through it.

THE COURT: Well, there's nothing contained in the files with respect to identification of witnesses on either side -- objection to witnesses identification or objection to exhibits. That means everything's been done informally.

MS. PATTON: Can I be heard, your Honor?

THE COURT: Sure.

MS. PATTON: The motion for the bill of particulars, which we've had a hearing on, I did specifically at that time ask for a witness list and

have not to this date been given a witness list, your Honor, and I do not dispute what Mr. Malloy has said -- or Mr. McGinn, I'm sorry.

I did in fact see everything that was in that file except for the top page that I have just now seen.

MR. MCGINN: If I may approach just to show the Court--

THE COURT: Just a moment. Would you point out for me, please, where in your bill of particulars you ask for identification of witnesses?

MS. PATTON: I did it verbally, your Honor, before Judge Howard, in which I don't have a transcript.

THE COURT: I have your bill of particulars and I have your memorandum in support of your bill of particulars, and there is nothing by way of any request for witnesses. I'm going to deny your objection.

Mr. Gonzalez?

COURT CLERK: You do solemnly swear that the testimony you are about to give in this case now pending before the Court will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

ROGER GONZALEZ

having been first duly sworn,

testifies as follows:

DIRECT EXAMINATION

BY MR. MCGINN:

Q. Sir, would you please state your name for the record?

A. Roger Gonzalez.

Q. For whom do you work?

A. I work for Provo City, code enforcement officer.

Q. And how long have you done that?

A. I have done that particular job for approximately 16 months.

Q. Officer, I want to direct your attention to March 19, 1996. Did you accompany Anthony Malloy to 1067 North 750 West on that day?

A. I did.

Q. Why did you do that?

A. I was asked to go with him just to witness the violation, which he basically had been addressing.

Q. And when you arrived at that address what did you do?

A. I proceeded to take the camera and take some photographs of the purported violations.

Q. Officer, do you recognize these photos that have been entered into evidence as Plaintiff's Exhibit 1 and 2?

A. I do.

Q. Did you take those?

A. I did.

Q. Does Exhibit 1 or Exhibit 2 show in any detail the interior area of the Patton property?

A. It does not, it shows only the trailer, which is in the driveway area.

Q. Would you describe for the Court what types of materials you saw in the front yard area at this address on that date?

A. I saw some debris of wood and lumber scraps that were laying around throughout the vicinity of the yard. I also saw some boxes -- it looked like it contains either canned food or fruits and vegetables, that type of thing. I saw some cardboard paper, I saw some other materials that were enclosed in plastic bags.

THE COURT: Were those items on the street side of the fence or the house side of the fence?

THE WITNESS: They were on the house side of the fence.

Q. BY MR. MCGINN: Were there additional items

Q. Is this on the sidewalk?
A. Yes.
Q. Adjacent to the property?
A. Adjacent to the property in front of the property.
Q. And how far away were you from the actual materials that you've just described?
A. I was probably five, ten feet, not very far.
Q. Were you able to see it clearly from the sidewalk?
A. I was.
MR. MCGINN: No further questions, your Honor.
THE COURT: Ms. Patton, do you have any questions for him?
MS. PATTON: In the interest of time, your Honor, because I was not aware and did not prepare for this, I'm going to ask Mr. Humiston to question (inaudible).
THE COURT: Well, he's not going to question for both of you.
MR. HUMISTON: I'm going to question him on behalf of Mr. Patton, but I guess she doesn't have any questions prepared because we did not know about this witness.

see it?

MR. HUMISTON: Yes.

(Defendant's Exhibit No. 1 received into evidence)

THE COURT: Mr. Humiston, anything else from you, sir?

MR. HUMISTON: No further evidence, your Honor.

THE COURT: Is Mr. Patton going to testify?

MR. HUMISTON: He is not.

THE COURT: Thank you very much.

Does the City want to be heard?

MR. MCGINN: Closing arguments, your Honor?

THE COURT: Yes, sir, closing arguments, we're now in that posture.

MR. MCGINN: Thank you. Your Honor, there has been much made of discrimination, singling out the Pattons. There's no evidence of that. Anthony Malloy testified that there are several violations in that area that they are working on, he didn't have his notes to tell them how many other violations are in the neighborhood. Nobody's targeting the Pattons.

Officer Malloy, Officer Gonzalez went out to the property, saw on March 19, 1996 that there was garbage, junk, materials in the -- may I approach, your Honor, they are right there.

THE COURT: Go ahead.

MR. MCGINN: They testified that from that photo you can't see clearly the interior of the yard, but Mr. Gonzalez was clear in that he stood on the sidewalk, looked in the yard, and described the types of materials; lumber that was in various bits and pieces, food upon the ground that were not covered, there was some questions alluding to the fact that this could have been firewood, but it was not kept -- there is no evidence that it was kept in any sort of manner, there is no evidence that it was used as firewood. There was boxes, bags strewn across the front yard.

They are clearly in violation. When there's a violation that needs to be addressed. If the property gets cleaned up and in five months there's another violation, that violation needs to be addressed.

We think the evidence that has been presented to the Court is clear. There's only been three witnesses, both Officers Malloy and Gonzalez testified that the yard in question did have junk, garbage, material, trash.

Mr. Keller for the defense testified -- he testified that the whole neighborhood -- he testified

this was something he had only found out last week.

So I would submit that as far as the count that remains, the State has failed to establish a prima facia case of a violation, and we would rest on that.

THE COURT: Thank you, sir.

MR. MCGINN: Thank you, your Honor. Subjective to termination, your Honor, terms and ordinances have their plain and ordinary meaning, and I understand that some people may consider one man's garbage is another man's treasure. But in this case the evidence was clear there were wood strewn about the lawn with -- uncovered that had been weathered, there were paper or cartons -- cardboard cartons that were overflowing, splitting, had been left out in the weather, were in a weathered condition.

I think this clearly under the plain and ordinary words used in the ordinance, 14-34-080, are trash, junk, materials that are clearly in the area.

As far as any intent, the officer indicated that he sent a letter indicating that there was a violation, the letter came back from Ms. Patton indicating that she didn't think there was a violation.

As to the meaning of the vehicle, whether

this trailer is junk, operational, the statute that was cited and read by Anthony Malloy -- by Joan Patton and read by Anthony Malloy, 41-1A-1008, deals with salvaged titles and selling inoperable vehicles for scrap. It has nothing to do with whether a vehicle is inoperable or abandoned in dealing with zoning, because it's salvaged titles.

And whether the Court considers the vehicle -- the trailer, I think that's really irrelevant, because not looking at the trailer, there's certainly sufficient testimony offered by two witnesses that is unrebutted by anybody that there was junk and materials that would fit the plain and ordinary meaning of 14-34-080.

Submit it on that to the Court.

THE COURT: Thank you. From the testimony provided, and from the exhibits that have been received, I have difficulty in being able to determine that the first part of Count I of an unlicensed motor vehicle, a wrecked, junked or partially dismantled or inoperative or abandoned motor vehicle was present on the defendant's property.

Plaintiff's Exhibits 1 and 2 are really of not much assistance to me to make any determination as to whether the yard is in compliance or it's not.

All those photographs really show is a residence with a bunch of material out in front and a parked trailer.

Mr. Malloy testified that he didn't remember if the trailer had flat tires on it on March 19th or not, and he said he had no evidence of whether the trailer was registered or whether it wasn't.

The second portion of the City's charging offense contained in Count I is the defendant, also during the time in question, stored trash, used materials, junk, household furniture, appliances, scrap materials, equipment or parts thereof in an open area not screened from the public streets and adjacent properties by an opaque wall or fence.

In reading the statute and hearing the testimony that's been provided by Mr. Malloy and Mr. Gonzalez, which is the testimony we have, and the testimony of Mr. Keller that we had a rather dilapidated neighborhood in which the defendants' property complied in making it appear to be the same as the neighborhood in question, I find that the City has met its burden of proof concerning the second portion of that charging information in Count I, therefore I find the defendants guilty as charged.

From the plain and simple meaning of the

ordinance, so you have your record on appeal, folks, I believe that the evidence has sufficiently demonstrated that there are items which consist of junk, stored trash, scraps of wood, deteriorated cardboard boxes, and even potential food products that looked like they had gone bad, from the witness' testimony.

And with that testimony being the only testimony on the record, with nothing else to rebut it or to describe what it was, then the Court has only one conclusion to draw, and that is is it believable or is it not, and I find that the City has met its proof with respect to belief.

The questions that came from the defendant, Mrs. Patton, was it possible for these things to be something else. I guess it's possible that Haley Bob comet had a spaceship behind it. Probable? Probably not. It's possible that all of these things were meant for the burning of firewood? Possible. But from the testimony I have on the record, and I have to make a finding from the testimony, it's probable that it was not firewood. So I find the defendants guilty as charged in Count I.

What's your pleasure with respect to sentencing? You may be sentenced today on each of

Now Mr. Humiston, you had something to say?

MR. HUMISTON: Well, your Honor, you addressed my objection in advance. I certainly strenuously object to any reference to the other lot in relation to sentencing on this lot. Certainly, as far as it's relevant, if the State is anticipating another prosecution, we're back to square 1, we will bring all the objections based on constitutionality and various other motions.

But I certainly -- I agree with the Court, I think you addressed our objection already that any sentencing with this lot has to pertain strictly with this lot.

THE COURT: I have no problem if Mr. Malloy and the Pattons with you, sir, want to meet and discuss what, if anything, needs to be done to bring 1067 North 750 West into compliance, and then make recommendations at the time of sentencing concerning that issue. I'd be happy to hear those from both sides, but that's where we're going to restrict ourselves.

MR. HUMISTON: If I respond, your Honor, just to review what we've done here today, Count II was dismissed and Count I, the finding was based on trash that was illegally in the yard on March 19th.

THE COURT: I found a violation of Count I.

MR. HUMISTON: Right.

THE COURT: The violation is based upon the trash that was found in the front yard, as you've phrased it.

MR. HUMISTON: And so I understand that when we, at the first sentencing, sentencing will pertain to the issues as found in Court's finding, specifically trash in the yard; is that correct?

THE COURT: My sentence will pertain to the fact that the property is out of compliance with the zoning because of the material that has been testified to as being in the yard.

MR. HUMISTON: Okay, thank you.

THE COURT: There is nothing in the street that I have found at this time that is out of compliance with the ordinance.

MR. HUMISTON: I think we can go ahead and schedule the sentencing.

COURT CLERK: We can set it on June 11th at 9 o'clock.

THE COURT: Is June 11th at 9 a.m. acceptable to you, Mrs. Patton?

MS. PATTON: Your Honor, can we extend it just about another week? I have a woman whose baby is

MS. PATTON: I did, your Honor.

THE COURT: Do you want to comment with regard to this request?

MS. PATTON: I would, your Honor.

THE COURT: Go ahead.

MS. PATTON: As the Court pointed out, the entire discovery process has been handled very informally. In the memorandum that Mr. Malloy sent to Mr. McGinn, he states that he took the pictures that were entered in as evidence. This is the same memorandum that mentions that Roger Gonzalez was another zoning officer.

Mr. Romney was the attorney from Provo City at my arraignment. He states on the court record that I will be given "everything that we have" from my verbal discovery request to the Court at the time from this statement. I conclude that the terms "everything in evidence, witness lists, complaints, et cetera."

At the pre-trial conference Mr. Malloy was present, Mr. McGinn was present, I was there, Natalie Zabriskie, Michael Humiston was also present. Mr. Gonzalez was not present. At this conference I was asked -- I asked who the complainants were, who the witnesses were, and Mr. Malloy informed me that there were no complainants, that he was the only one, that

this case originated because of an open file that he had been given when he first started working for Provo City.

Let me emphasize that Mr. Gonzalez was not present, nor was his name even mentioned. Mr. Malloy further lead me to believe that the pictures that were in the file were taken by him.

On three separate occasions I scheduled appointments with Mr. Malloy to come out to the property and tell me what the problems were. Each time Mr. Malloy arrived he came with another person, an intern named Bryce.

At none of these meetings was Mr. Gonzalez mentioned. He was not present, and I was further lead to believe that Mr. Malloy had taken all the pictures and was the only zoning officer involved in this case.

Accordingly I prepared my defense based on the City only using the items they had showed me as evidence, as Mr. Malloy as the sole witness. From the record of the trial is this evident that I had that had the trial proceeded I was lead to believe that it would, the outcome would have been completely different.

It is obvious that the only testimony that allowed for the conviction was the testimony of Mr.

Gonzalez, and like Mr. Malloy, who had I prepared cross exam questions for, I had absolutely no time or opportunity to prepare any type of cross exam of Mr. Gonzalez.

Had I known about the admission of Mr. Gonzalez, the admission of the additional surprise witness, I could have prepared for this eventuality. By the Court allowing testimony from this surprise witness, my case was unduly prejudiced, I was denied due process, I was not given the opportunity to face and cross question my accusers as guaranteed by this judicial system. The principle of fundamental fairness was compromised, and I did not get a fair trial.

I personally did not feel that this one admission was done deliberately or maliciously, nor do I believe that the oversight was intention on the part of the Provo City prosecutor. However, in the interest of fundamental fairness, due process, and opportunity to defend against accusers, I would ask that this Court grant this motion for the arrest of judgment at this time.

THE COURT: Do you want to be heard, Counsel?

MR. MCGINN: Yes, your Honor. I believe